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13 Attorneys for Third-Party Defendant COR Clearing, LLC

14 UNITED STATES DISTRICT COURT
15 DISTRICT OF NEVADA
16

17 CHINA ENERGY CORPORATION,
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Plaintiff,
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vs.
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ALAN HILL, et al.,
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Defendants,
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23 ELENA SAMMONS AND MICHAEL
SAMMONS,

Third-Party Plaintiffs
24

vs.
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CEDE & CO., THE DEPOSITORY TRUST
26 COMPANY, AND COR CLEARING

Third-Party
27 Defendants.
28

3:13-CV-562-MMD-VPC

**MOTION TO DISMISS AND/OR
TO STRIKE THIRD-PARTY
COMPLAINT FOR FAILURE TO
COMPLY WITH FEDERAL RULE
OF CIVIL PROCEDURE 14(a)**

1 Third-Party Defendant COR Clearing, LLC ("COR") respectfully moves this Court to
 2 dismiss and/or to strike, pursuant to Federal Rule of Civil Procedure 14(a)(4), the First Amended
 3 Third-Party Complaint of Third-Party Plaintiffs Elena Sammons and Michael Sammons
 4 (collectively, the "Sammons").¹ This motion is supported by the following memorandum of points
 5 and authorities.

6 **MEMORANDUM OF POINTS AND AUTHORITIES**

7 **INTRODUCTION**

8
 9 The Sammons' operative Third-Party Complaint against COR, the First Amended Third-
 10 Party Complaint (Doc. 128), is due to be dismissed or stricken because it does not comply and
 11 cannot comply with the requirements of Rule 14(a) of the Federal Rules of Civil Procedure.² Under
 12 Rule 14(a)(1) of the Federal Rules of Civil Procedure, a defending party like the Sammons "[m]ay,
 13 as third-party plaintiff, serve a summons and complaint on a nonparty [such as COR] *who is or may*
 14 *be liable to it for all or part of the claim against it.*" Fed. R. Civ. P. 14(a)(1) (emphasis added). In
 15 this case, a third-party complaint cannot be properly asserted against COR because Plaintiff China
 16 Energy Corporation ("CEC") is not seeking to hold the Sammons liable for anything. Instead, CEC
 17 seeks either: (a) a declaration that the Sammons did not properly exercise their dissenters' rights and
 18 that CEC owes them nothing for their shares, *see* Doc. 2-1 at ¶ 40, or (b) a determination from the
 19 Court that the fair value of the Sammons' CEC shares is \$0.14 per share, *see id.* at ¶ 49, in which
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 21

22 ¹ COR makes this motion without waiver of its right to move to compel arbitration should this Court
 23 deny its motion to dismiss and/or strike.

24 ² The Sammons' Third-Party Complaint (Doc. 116) has been replaced and superseded by the
 25 Sammons' First Amended Third-Party Complaint (Doc. 128). *See Cano v. Taylor*, 739 F.3d 1214,
 26 1220 (9th Cir. 2014) ("As a general rule, when a plaintiff files an amended complaint, the amended
 27 complaint supercedes the original, the latter being treated thereafter as non-existent.") (quotation and
 28 punctuation omitted).

1 case CEC would owe the Sammons money for their shares. Under either scenario, the Sammons
2 cannot satisfy Rule 14's requirements, and the Court should dismiss or strike the Sammons' Third-
3 Party Complaint against COR.

4 **RELEVANT FACTS**

5 **The Relief Sought in the CEC Complaint**

6
7 The Sammons seek to pull COR – which operated solely as the clearing firm for Just2Trade
8 where Third-Party Plaintiff Elena Sammons maintains a brokerage account, *see* Doc. 128 at ¶ 7 –
9 into this action in order to seek a declaration that *if* the Sammons failed to perfect their dissenter's
10 rights, then that failure was caused by "error(s) of the Third-Party Defendants which constituted
11 breach of contract, breach of fiduciary obligations, and/or negligence," Doc. 128 at ¶ 42. CEC's
12 original Complaint, which named the Sammons and others as defendants and which was removed to
13 this Court, seeks a declaratory judgment that the Defendants, including the Sammons, did not
14 properly assert their dissenters' rights under Chapter 92A of the Nevada Revised Statutes in
15 connection with a 12,000,000 to 1 cash-out reverse split of CEC stock and thus are due nothing for
16 their CEC shares. *See* Doc. 2-1 at ¶ 40.

17
18 In the alternative, the CEC Complaint asks the Court to value the Defendants' shares of CEC
19 stock at \$0.14 per share. *See id.* at ¶¶ 48-49. If the Court were to determine that the value of the
20 Sammons' stock is \$0.14 per share, as alleged by CEC, *see id.* at ¶ 49, then CEC would owe the
21 Sammons \$91,000.00 (650,000 x \$0.14). *See* Doc. 128 at ¶¶ 3, 11 (alleging that the Sammons are the
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beneficial owner of 650,000 shares of CEC); *see also* Doc. 2-1 at ¶ 4. The CEC Complaint does not seek to hold the Sammons liable to CEC for anything.³

The Third-Party Complaint

After Defendants removed this action on October 8, 2013, *see* Doc. 2, the Sammons sought leave to file a third-party complaint against Cede & Co. ("Cede"), The Depository Trust Company ("DTC") and COR (collectively the "Third-Party Defendants") in an attempt to establish that, if the Sammons failed to timely dissent to the cash-out reverse split of CEC stock, then DTC, Cede, and/or COR and not the Sammons are responsible for that failure. *See* Doc. 54 at 3-4. This Court granted that requested leave, noting, *inter alia*, that the motion was unopposed, which under Local Rule 7-2(d) constitutes consent to the motion being granted. *See* Doc. 115 at 2.⁴

On January 22, 2014, the Sammons filed the original Third-Party Complaint against COR and the other Third-Party Defendants. *See* Doc. 116. Before service was perfected on the Third-Party Defendants, the Sammons filed the First Amended Third-Party Complaint (the "Amended Third-Party Complaint"). *See* Doc. 128. The only count alleged in the Amended Third-Party Complaint seeks a declaratory judgment that "if [the Sammons] failed to perfect their right to judicial appraisal of the 650,000 shares of CEC it was caused by error(s) of the Third-Party Defendants which constituted breach of contract, breach of fiduciary obligations, and/or negligence," and does not seek

³ CEC does include a bald prayer for relief in the form of attorneys' fees and costs. *See* Doc. 2-1 at ¶¶ 41, 50; *see id.* at Prayer for Relief, ¶ 3. However, CEC cites no statutory or contractual authority for such relief and those claims do not affect this motion. "Under the 'American rule,' litigants ordinarily are required to bear the expenses of their litigation unless a statute or private agreement provides otherwise." *Carbonell v. I.N.S.*, 429 F.3d 894, 897-98 (9th Cir. 2005).

⁴ COR was not a party to this action at the time the Sammons requested leave to file a third-party complaint and thus did not have an opportunity to oppose that request and argue the authorities discussed herein.

1 damages against the Third-Party Defendants.⁵ *Id.* at ¶ 42. The Sammons allege that the Third-Party
 2 Defendants assumed responsibility for properly asserting Elena Sammons' dissenter's rights pursuant
 3 to NRS 92A.300-500 and failed to carry out these alleged duties properly. *See id.* at ¶ 40.
 4 Specifically, the Sammons allege that: (1) Cede sent an assertion of appraisal rights to CEC, which
 5 contained two typographical errors, *see id.* at ¶ 25; (2) Cede withdrew the original assertion of
 6 appraisal rights and simultaneously submitted a subsequent assertion of appraisal rights with
 7 different instructions to CEC, *see id.* at ¶ 28; (3) the Third-Party Defendants unnecessarily ordered a
 8 new stock certificate which delayed delivery of the certificate to CEC, *see id.* at ¶ 32; and (4) the
 9 Third-Party Defendants failed to timely deliver the new stock certificate to CEC, *see id.* at ¶ 33.
 10 Simply stated, the Sammons seek a declaration that *if* this Court determines they failed to perfect
 11 their dissenters' rights, it was because of the alleged "errors" of COR and the other Third-Party
 12 Defendants. They do not seek to transfer any liability asserted against them to COR.
 13
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15 PLEADING STANDARD FOR THIRD-PARTY COMPLAINTS

16 Rule 14 of the Federal Rules of Civil Procedure sets out the following requirements for
 17 impleader:

18 A defending party may, as third-party plaintiff, serve a summons and complaint on a
 19 nonparty who is or may be liable to it for all or part of the claim against it.

20 Fed. R. Civ. P. 14(a)(1). Rule 14(a)(4) provides that "[a]ny party may move to strike the third-party
 21 claim"⁶
 22

23 ⁵ In the original Third-Party Complaint, the Sammons sought compensatory damages of \$3,680,000
 24 against the Third-Party Defendants. *See* Doc. 116 at 10. The Amended Third-Party Complaint
 25 abandons that damages claim. *See* Doc. 128 at 12.

26 ⁶ While Rule 14(a)(4) permits motions to "strike" third-party complaints, courts in this Circuit have,
 27 on a third-party defendant's motion, regularly dismissed complaints for failure to comply with Rule
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1 Although the purpose of third-party practice under Rule 14 "is to promote judicial efficiency
 2 by eliminating the necessity for the defendant to bring a separate action against a third individual
 3 who may be secondarily or derivatively liable to the defendant for all or part of the plaintiff's
 4 original claim," *Southwest Administrators, Inc. v. Rozay's Transfer*, 791 F.2d 769, 777 (9th Cir.
 5 1986),

6
 7 [t]he crucial characteristic of a Rule 14 claim is that defendant is attempting to
 8 transfer to the third-party defendant the liability asserted against him by the original
 9 plaintiff. The mere fact that the alleged third-party claim arises from the same
 10 transaction or set of facts as the original claim is not enough.

11 *Stewart v. Am. Int'l Oil & Gas Co.*, 845 F.2d 196, 200 (9th Cir. 1988) (quoting 6 Wright & Miller
 12 *Fed. Prac. & Proc.* § 1446 at 257 (1971 ed.)) (affirming the dismissal of a third-party complaint for
 13 failure to comply with Rule 14's requirements) (emphasis added). Moreover, the Ninth Circuit has
 14 adopted "narrow impleader requirements" and a "narrow approach" to evaluating the propriety of
 15 third-party complaints. *Wausau Underwriters Ins. Co. v. Cont'l Cas. Co.*, No. CV-07-0056, 2008
 16 WL 793618, at *5, *4 (E.D. Wash. Mar. 24, 2008) (comparing caselaw from other circuits and from
 17 the Ninth Circuit and applying the "narrow interpretation" of Rule 14(a) adhered to by the Ninth
 18 Circuit and other courts across the country).

19 While "[t]he decision to allow a third-party defendant to be impleaded under rule 14 is
 20 entrusted to the sound discretion of the trial court," *United States v. One 1977 Mercedes Benz*, 708
 21 F.2d 444, 452 (9th Cir. 1983), there must be "some possible scenario under which the third party

22 14(a)(1)'s requirements for impleader. *See, e.g., Stewart v. Am. Int'l Oil & Gas Co.*, 845 F.2d 196,
 23 199-200 (9th Cir. 1988) (affirming trial court's dismissal of third-party complaint); *United States v.*
 24 *One 1977 Mercedes Benz*, 708 F.2d 444, 452 (9th Cir. 1983) (same); *Am. Contractors Indem. Co. v.*
 25 *Bigelow*, Case No. CV 09-08108, 2010 WL 5638732, at *3 (D. Ariz. July 28, 2010) (dismissing
 26 third-party complaint pursuant to Rule 14); *Uldricks v. Kapaa 382 LLC*, Case No. 07-00117, 2007
 27 WL 2694409, at *3-5 (D. Haw. Sept. 11, 2007) (same).

defendant may be liable for some or all of the defendant's liability to the plaintiff" to justify impleader, *Uldricks v. Kapaa 382 LLC*, Case No. 07-00117, 2007 WL 2694409, at *3 (D. Haw. Sept. 11, 2007) (quotation omitted).

ARGUMENT

The Sammons' Amended Third-Party Complaint is due to be dismissed because it fails to comply with Rule 14's requirements for a third-party complaint. Because the CEC Complaint does not seek to impose liability on the Sammons, the Amended Third-Party Complaint does not "attempt[] to transfer to the third-party defendant the liability asserted against defendant by the original plaintiff, " which is the "crucial characteristic of a Rule 14 claim." 6 Wright & Miller *Fed. Prac. & Proc. Civ.* § 1446 (3d ed. 2013) (quoted in *Stewart*, 845 F.2d at 200).

Here, CEC has filed a complaint seeking declaratory relief.⁷ The only two possible outcomes of CEC's action are (1) that this Court will find that the Sammons did not properly raise and assert their dissenters' rights and, as a result, CEC owes the Sammons nothing; or (2) that this Court will find that the Sammons did properly dissent, will value the shares in dispute on its own, and will determine that CEC owes the Sammons some finite sum of money, which CEC asserts is \$0.14 per share, *see* Doc. 2-1 at ¶ 49. Accordingly, there is no scenario under which the Sammons will be subject to "liability asserted against [them] by [CEC]." 6 Wright & Miller *Fed. Prac. & Proc. Civ.* § 1446 (3d ed. 2013) (quoted in *Stewart*, 845 F.2d at 200). Therefore, although the Amended Third-Party Complaint "is a related claim" to relief requested in CEC's complaint, any liability to which COR may be subject is not "secondary or derivative" of the Sammons' liability as is required by Rule

⁷ As pointed out in note 3, CEC also made a bald prayer for attorneys' fees with no citation to any basis in law or in contract for this relief. *See* Doc. 2-1 at ¶¶ 41, 50.

1 14. *See One 1977 Mercedes Benz*, 708 F.2d at 452. Indeed, the Sammons are not and cannot be
2 subject to any liability as a result of any outcome in the underlying complaint; thus, a third-party
3 claim against COR is improper. *See Uldricks*, 2007 WL 2694409, at *3 (to justify impleader, there
4 must be "some possible scenario under which the third party defendant may be liable for some or all
5 of the defendant's liability to the plaintiff") (quotation omitted).
6

7 **Case Law from Courts in this Circuit Supports Dismissal of the Amended Third-Party**
8 **Complaint**

9 Case law from courts in this Circuit supports COR's motion to dismiss or strike the Sammons
10 Amended Third-Party Complaint. Courts in this Circuit have dismissed or denied leave for the filing
11 of third-party complaints where the proposed third-party defendant was not or could not be liable to
12 the third-party plaintiff for all or part of the third-party plaintiff's liability to the original plaintiff. In
13 *Stewart*, the Ninth Circuit affirmed the trial court's dismissal of the defendant/third-party plaintiff
14 Meridian's third-party complaint in a case where it had been sued for securities fraud, common law
15 fraud, and other misrepresentation and fraud-related claims concerning the sale of oil and gas well
16 interests to the plaintiffs. 845 F.2d at 198-99. After being sued for securities fraud related to the
17 sales, Meridian, the seller defendant, attempted to implead two other companies which had sold the
18 gas and oil well interests to Meridian. *See id.* at 199. Meridian argued that it had purchased the oil
19 and gas well interests from the third-party defendants as a result of the same fraudulent
20 misrepresentations Meridian was alleged to have made to the plaintiffs such that, if Meridian was
21 liable to the plaintiffs for securities fraud and misrepresentations, then the third-party defendants
22 must also be liable to Meridian for the same violations, as the Meridian made the same sales pitch to
23 plaintiffs that the third-party defendants had made to Meridian. *See id.*
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1 The Ninth Circuit affirmed the trial court's dismissal of the third-party complaint, finding
2 that, although the same subject matter (the oil and gas wells) were involved, the district court did not
3 abuse its discretion in finding that "there was no derivative or secondary liability involved." *Id.* at
4 200. Thus, in *Stewart*, although a finding against Meridian could have bolstered or assisted in
5 proving Meridian's claim against the third-party defendants, the third-party defendants' liability to
6 Meridian was not "derivative" of Meridian's liability to the plaintiffs.
7

8 Similarly, in *Uldricks*, the district court for the District of Hawaii dismissed a third-party
9 complaint for failure to comply with Rule 14's requirements. There, the plaintiff Uldricks sued
10 Kapaa 382 for breach of an agreement to pay a \$1.050 million fee associated with a development
11 loan, and Kapaa 382 subsequently impleaded Uldricks' employer, U.S. Financial Mortgage
12 Corporation ("USFMC"), alleging that USFMC had breached its own contractual duties associated
13 with procuring the loan funding, that its performance in paying the fee was excused as a result of
14 USFMC's breaches, and that USFMC was liable for Uldricks' acts or omissions based upon a theory
15 of *respondeat superior*, among other allegations. *See* 2007 WL 2694409, at *2. The district court
16 granted USFMC's motion to dismiss the third-party complaint observing that:
17

18 These claims are related to but not derivative of Uldricks' breach of contract claim
19 against Kapaa 382. Kapaa 382 does not attempt to transfer to USFMC the liability
20 asserted against it by the Uldricks; instead, Kapaa 382 claims that USFMC is liable
21 to it for breach of contract and fraud based on the same transaction underlying
22 Uldricks' Complaint. "The third-party plaintiff is not alleging that third-party
23 defendants share fault, but that third-party defendants were completely at fault. A
24 third-party plaintiff cannot boot-strap a defense to fraud into a case for joint
25 tortfeasor liability." *Gabriel Capital, L.P. v. NatWest Fin., Inc.*, 137 F. Supp. 2d 251,
26 265 (S.D.N.Y. 2000) . . . The fact that the claims asserted in the Complaint and
27 Third-Party Complaint are, as Kapaa 382 characterizes them, "inextricably
28 intertwined," does not satisfy the standard for third-party practice under Rule 14. It is
not sufficient that the claims asserted in the Third-Party Complaint merely arise from
the same transaction or occurrence as the underlying suit. *Impleader is narrower,*

1 *requiring an attempt to pass on to the third party all or part of the liability asserted*
 2 *against the defendant.*

3 *Uldricks*, 2007 WL 2694409, at *4 (emphasis added, punctuation and citations omitted). *See also*
 4 *Am. Contractors Indem. Co. v. Bigelow*, Case No. CV 09-08108, 2010 WL 5638732, at *2 (D. Ariz.
 5 July 30, 2010) (dismissing third-party complaint and observing that, "[a]s the crucial characteristic
 6 of a Rule 14(a) claim is that the third-party plaintiff is attempting to transfer to the third-party
 7 defendant the liability asserted by the original plaintiff; the mere fact that the alleged third-party
 8 claim arises from the same transaction or set of facts as the original claim is not enough.").

9 **Case Law from Courts in Other Circuits also Supports Dismissal**

10 While the Ninth Circuit notably has "narrow impleader requirements," *Wausau*
 11 *Underwriters*, 2008 WL 793618, at *5, courts in other circuits have reached the same result where
 12 the third-party plaintiff was not seeking to pass on all or part of its liability on to the third-party
 13 defendant. *See SE Mortg. Co. v. Mullins*, 514 F.2d 747, 749-50 (5th Cir. 1975) ("[T]he third party
 14 must necessarily be liable over to the defendant for all or part of the plaintiff's recovery, or . . . the
 15 defendant must attempt to pass on to the third party all or part of the liability asserted against the
 16 defendant. Whichever expression is preferred, it is clear that impleader under Rule 14 requires that
 17 the liability of the third party be dependent upon the out come of the main claim. . . . The suggestion
 18 that a separate and independent claim can be made the proper subject of a third party complaint
 19 because, but for the violation of duty alleged the main claim would not have matured, has been
 20 rejected by this and other courts."); *U.S. Fire Ins. Co. v. Reading Mun. Airport Auth.*, 130 F.R.D. 38,
 21 39 (E.D. Pa. 1990) ("If U.S. Fire prevails in its declaratory judgment action, it will be entitled to a
 22 judgment that it is not obligated under the Insurance Contract with respect to defendant Donald
 23 Freeman's claim against defendant Airport Authority. That does not create a claim against
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1 defendant/third-party plaintiff Airport Authority for which third-party defendant Mast & Moyer
 2 could be liable in all or in part. Therefore the fundamental prerequisite of joinder under Fed. R. Civ.
 3 P. 14(a) is not met.").⁸

4 **The Amended Third-Party Complaint Fails to Fulfill the Crucial Characteristic of a Third-**
 5 **Party Claim**

6 Because the Sammons cannot be subject to liability as a result of the outcome of CEC's claim
 7 for declaratory relief, COR cannot be liable to the Sammons for any part of CEC's original claim.
 8 Accordingly, the Third-Party Complaint is improper under Rule 14 and is due to be dismissed. The
 9 "crucial characteristic of a Rule 14 claim . . . that defendant is attempting to transfer to the third-
 10 party defendant the liability asserted against him by the original plaintiff," *Stewart*, 845 F.2d at 200
 11 (quoting 6 Wright & Miller *Fed. Prac. & Proc.* § 1446 at 257 (1971 ed.)), is missing here. Due to
 12 the nature of the causes of action in the CEC Complaint, which do not seek to impose any liability
 13 on the Sammons, there is no "possible scenario under which the third party defendant [COR] may be
 14 liable for some or all of the defendant's [the Sammons'] liability to the plaintiff [CEC]," and the
 15 Sammons' Amended Third-Party Complaint against COR is improper. *See Uldricks*, 2007 WL
 16 2694409, at *3.
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21 ⁸ Conversely, some district courts in other circuits across the country have taken a more lenient
 22 stance with regard to Rule 14's requirements in cases where the underlying claim is a declaratory
 23 judgment action. *See, e.g., Country Mut. Ins. Co. v. Rocky Mountain Constr. Co.*, No. 12-453, 2013
 24 WL 438940, at *2-5 (D. Colo. Feb. 5, 2013); *Old Republic Ins. Co. v. Concast, Inc.*, 99 F.R.D. 566,
 25 568-70 (S.D.N.Y. 1983). However, under the controlling precedent in this Circuit which is
 26 comparatively "narrow," *see Wausau*, 2008 WL 793618, at *5, the Amended Third-Party Complaint
 27 fails to comply with the requirements for a third-party complaint.
 28

1 **CONCLUSION**

2 For the reasons stated above, the Sammons' Amended Third-Party Complaint does not satisfy
3 the requirements to maintain a third-party complaint under Rule 14 and it is due to be stricken or
4 dismissed. The CEC Complaint simply does not seek to impose any liability on the Sammons. Thus,
5 the Sammons have no liability asserted against them to transfer to COR, which is the crucial element
6 of a claim allowed under Rule 14(a). *See Stewart*, 845 F.2d at 200. The plain text of Rule 14(a)(1),
7 which permits the filing of third-party complaints only against "a nonparty who is or may be liable to
8 [a defendant] for all or part of the [plaintiff's] claim against [the defendant]," simply does not support
9 a third-party complaint here. Based upon the requirements of Rule 14 as well as the Ninth Circuit's
10 narrow interpretation of that rule, the Sammons' Amended Third-Party Complaint is due to be
11 dismissed or stricken.
12

13 Respectfully submitted,
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15 DATED: February 24, 2014.

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CERTIFICATE OF SERVICE

I, Barbara Salinas, certify that on February 24, 2014, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the electronic mail notice list or served the foregoing via U.S. Mail, properly addressed and postage prepaid, as noted.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed February 24, 2014, at Reno, Nevada.

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